

1979

Trusts—Admissibility of Extrinsic Evidence, the Effect of Possible Illegality on a Reversionary Interest, and the Duties of a Fiduciary to Successive Beneficiaries—In re Trust Known as Great Northern Iron Ore Properties, 263 N.W.2d 610 (Minn.), cert. denied, 439 U.S. 835 (1978)

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

(1979) "Trusts—Admissibility of Extrinsic Evidence, the Effect of Possible Illegality on a Reversionary Interest, and the Duties of a Fiduciary to Successive Beneficiaries—In re Trust Known as Great Northern Iron Ore Properties, 263 N.W.2d 610 (Minn.), cert. denied, 439 U.S. 835 (1978)," *William Mitchell Law Review*: Vol. 5: Iss. 2, Article 9.

Available at: <http://open.mitchellhamline.edu/wmlr/vol5/iss2/9>

This Note is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact

sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

Trusts—ADMISSIBILITY OF EXTRINSIC EVIDENCE, THE EFFECT OF POSSIBLE ILLEGALITY ON A REVERSIONARY INTEREST, AND THE DUTIES OF A FIDUCIARY TO SUCCESSIVE BENEFICIARIES—*In re Trust Known as Great Northern Iron Ore Properties*, 263 N.W.2d 610 (Minn.), *cert. denied*, 439 U.S. 835 (1978).

In recent years, the Minnesota Supreme Court has spoken infrequently on the law of trusts. Its two decisions concerning the Great Northern Iron Ore Properties trust, therefore, take on significance beyond the actual decisions.¹ In these cases, the court addressed issues involving the admissibility of extrinsic evidence to interpret trust provisions,² the effect of possible illegality of reversionary interests,³ and the duties owed by a fiduciary to successive beneficiaries.⁴

The Great Northern trust encompasses thousands of acres of Minnesota land being mined for iron ore under long-term royalty leases.⁵ The settlor of the trust, Lake Superior Company, Ltd., organized by James J. Hill and his associates, established the trust on December 7, 1906.⁶ The trust was to endure for the lives of eighteen named individuals plus twenty years, "unless . . . sooner determined."⁷ Upon termination of the trust, all remaining cash assets are to be conveyed to the beneficiaries of the trust income,⁸ holders of certificates traded on the New York Stock Exchange.⁹ Non-cash property is to revert to the settlor or its assigns,¹⁰ presently Burlington Northern Inc.¹¹ (reversioner).

1. See *In re Trust Known as Great Northern Iron Ore Properties*, 263 N.W.2d 610 (Minn.), *cert. denied*, 439 U.S. 835 (1978) [hereinafter cited as *Great Northern II*]; *In re Trust Known as Great Northern Iron Ore Properties*, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976) [hereinafter cited as *Great Northern I*].

2. See notes 29-32, 40-48 *infra* and accompanying text.

3. See notes 33, 64-83 *infra* and accompanying text.

4. See notes 84-86 *infra* and accompanying text.

5. See *Great Northern II*, 263 N.W.2d at 614.

6. See *Great Northern I*, 308 Minn. at 223-24, 243 N.W.2d at 304. In the years between 1896 and 1898, James J. Hill personally acquired vast acreages of iron ore property. See Supplemental Record at SR-6 to -7, -50 to -52, -118 to -19, *Great Northern I*, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976) (excerpts from testimony by James J. Hill before the United States House of Representatives in 1907 and 1913). Hill subsequently assigned his title to the land in blank to a number of land companies owned by the Great Northern Railway. See *id.* at SR-119. On October 20, 1899, the Great Northern Railway conveyed its stock in the various land companies to Lake Superior Company, Ltd., see *id.* at SR-110 to -115, a Michigan limited partnership created on August 29, 1899. See Addendum to Brief on Behalf of Charles S. Arms and Elizabeth P. Arms, Respondents at 39, *Great Northern I*, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976).

7. See *Great Northern I*, 308 Minn. at 226 & n.4, 243 N.W.2d at 306 & n.4.

8. See *Great Northern II*, 263 N.W.2d at 614 & n.4 (quoting paragraph 17 of the trust instrument).

9. *Id.* at 614.

10. See *id.* at 614 n.4 (quoting paragraph 17 of the trust instrument). A copy of the complete trust instrument may be found in Appellants' Appendix at A-4 to -14, *Great Northern I*, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976).

In 1972, the trustees, in view of the nearing conclusion of the trust, petitioned the Ramsey County District Court for instructions on their duties and responsibilities toward the conflicting interests of the certificate holders and the reversioner.¹² Several certificate holders¹³ (respondents) intervened in the action, contending that the settlor had established the trust entirely for their benefit and that the terms of the trust obligated the trustees to convert the trust assets into cash for distribution prior to termination of the trust.¹⁴ After the trustees amended their petition to include a request for instructions on their duty to convert trust property to cash,¹⁵ the reversioner filed an objection, arguing that the trust plainly provided that the certificate holders were entitled to the income generated by the corpus and the proceeds from sale of the corpus, but only during the trust term.¹⁶ The reversioner asserted that upon termination, the residual property was to be for the exclusive benefit of the reversioner.¹⁷

11. On February 3, 1913, Lake Superior Company, Ltd. transferred its reversionary interest in the trust to the Great Northern Railway Company. See Brief of Appellant Burlington Northern Inc. at 43-44, Great Northern I, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976). Burlington Northern acquired its interest through a merger between the Great Northern Railway Company, the Great Northern Pacific & Burlington Lines, Inc., the Northern Pacific Railway Company, and the Pacific Coast Railroad Company. See Supplemental Record at SR-378, Great Northern I, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976).

12. See Great Northern II, 263 N.W.2d at 613-14. See generally Act of Apr. 15, 1933, ch. 259, § 3, 1933 Minn. Laws 329, 329-30 (current version at MINN. STAT. § 501.35 (1978)) (1972 version provides that a trustee may petition the district court for instructions in the administration of the trust or for construction of the trust instrument).

At the time of the original petition for instructions in 1972, only five of the 18 named measuring lives were still living. See Great Northern II, 263 N.W.2d at 614 n.1. At the time of the respondents' petition for certiorari following Great Northern II, only two remained, aged 76 and 92. See Petition for Writ of Certiorari at 7, Arms v. Watson, 439 U.S. 835, *denying cert. to* Great Northern II, 263 N.W.2d 610 (Minn. 1978). For a complete list of the 18 measuring lives and their dates of birth, see Supplemental Record at SR-519, Great Northern I, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976).

13. Certificate holders Charles S. Arms and Elizabeth P. Arms petitioned the district court for permission to intervene in the matter. See Appellants' Appendix at A-15 to -17, Great Northern I, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976) (petition of Charles S. Arms and Elizabeth P. Arms). The Arms originally requested that the hearings proceed as a class action on behalf of all certificate holders, *see id.*, however, the district court, in its order of December 20, 1972, ruled that such an action could not be maintained. *See id.* at A-35, -37 (order and memorandum of the district court). In Great Northern II, the only certificate holders involved were the Arms and Margot Siegel [hereinafter referred to as respondents]. *See* 263 N.W.2d at 613.

14. See Appellants' Appendix at A-16, Great Northern I, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976) (petition of Charles A. Arms and Elizabeth P. Arms).

15. *See id.* at A-19 to -21.

16. *See id.* at A-22 to -25.

17. *See id.*

The district court, finding certain sections of the trust instrument ambiguous, admitted extrinsic evidence to construe the trust terms, and determined that the settlor had believed the trust would end by the time the natural ore was depleted.¹⁸ The district court held that, as a result, the reversion was intended to be a receptacle for valueless properties because the settlor had not anticipated the significant value of taconite.¹⁹ Furthermore, the language “unless . . . sooner determined” in the termination clause was construed as an authorization for the trustees to end the trust before its stated expiration.²⁰ Extrinsic evidence also was relied on to explain the apparent inconsistency between the clause empowering the trustees to sell the corpus and the provision requiring transfer of all non-cash property to the reversioner upon termination.²¹ Because the trustees could liquidate trust assets, the district court found the reversionary interest to be illusory.²² Based on these findings, the district court advised the trustees that the settlor’s sole purpose in creating the trust was to benefit the certificate holders.²³ The district court also concluded that the settlor had not intended to vest ownership of the property in the railroad, because to do so would have constituted a violation of the railroad’s corporate charter as well as federal law.²⁴ Therefore, the district court ruled that the trust should be terminated²⁵ and it ordered the trustees to draft a proposal, to be approved by the district court, that would convey all trust assets into a corporation.²⁶ The certificate holders would own shares in the corporation equivalent to their shares in the trust and the reversionary interest would be defeated.²⁷

Upon appeal by the reversioner, the Minnesota Supreme Court reversed the district court’s holding in *In re Trust Known as Great Northern Iron Ore Properties*²⁸ (*Great Northern I*). The court held that the phrase “unless . . . sooner determined” was an unambiguous and commonly used trust term that merely anticipated legislative action or other legal situations that could defeat the trust before its stated termination.²⁹ The court also found that the provisions defining the trustee’s

18. See *Great Northern I*, 308 Minn. at 224, 243 N.W.2d at 305; Appellants’ Appendix at A-46 to -49. The entire memorandum and instructions issued to the trustees by the Ramsey County District Court may be found in Appellants’ Appendix at A-45 to -98.

19. See 308 Minn. at 227-28, 243 N.W.2d at 306; Appellants’ Appendix at A-91 to -96.

20. See 308 Minn. at 227 & n.4, 243 N.W.2d at 306 & n.4.

21. *Id.* at 228-29, 243 N.W.2d at 306-07; Appellants’ Appendix at A-48 to -49.

22. See Appellants’ Appendix at A-93 to -98.

23. See *id.*

24. See 308 Minn. at 229-30, 243 N.W.2d at 307; Appellants’ Appendix at A-89 to -90.

25. 308 Minn. at 224, 243 N.W.2d at 305; Appellants’ Appendix at A-96 to -98.

26. 308 Minn. at 224, 243 N.W.2d at 305; Appellants’ Appendix at A-96 to -98.

27. See 308 Minn. at 224, 243 N.W.2d at 305; Appellants’ Appendix at A-96 to -98.

28. 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976).

29. *Id.* at 227, 243 N.W.2d at 306. The court mentioned three common situations in which termination could occur: failure of the subject matter through exhaustion of the ore,

power to sell were not inconsistent³⁰ because the trust clearly stated that properties not liquidated by the trustees in their discretion prior to termination must be turned over to the reversioner upon the conclusion of the trust.³¹ Thus, extrinsic evidence was inadmissible to "vary the plain meaning expressed in the [trust] instrument."³² The court also concluded that neither the settlor's intent nor the validity of the reversionary interest could be affected by the possibility that subsequent possession of the reversion by the railroad may violate both its charter and federal law.³³ Because the lower court had ordered the trust terminated, the supreme court remanded the case for further proceedings.³⁴ The district court was directed to issue instructions to the trustees consistent with the supreme court's opinion.³⁵

On remand, the district court again utilized extrinsic evidence to construe the settlor's purpose in creating the trust.³⁶ The district court found that the settlor's intent, the "unambiguous meaning" of the trust, and a "practical construction" of the trust required the trustees to convert the trust assets to cash for the sole benefit of the certificate holders prior to the end of the trust term.³⁷ In conclusion, the district court held that the trustees owed no duty to the reversioner.³⁸

Once again the reversioner appealed, and for the second time the supreme court reversed in *In re Trust Known as Great Northern Iron Ore Properties*³⁹ (*Great Northern II*). In the second appeal, the supreme court first considered the district court's instructions to the trustees. The respondents argued that the instructions were supported by the termination clause of the trust instrument. The clause directs the trustees to "wind up" trust affairs at the conclusion of the trust and declares the trust terminated one year prior to the end of the statutory perpetuities period.⁴⁰ The respondents asserted that the termination

termination by mutual consent, and termination resulting from amendment of Minnesota statutes relating to trusts. *Id.* See also Brief of Appellant Burlington Northern Inc. at 74-75.

30. 308 Minn. at 228-29, 243 N.W.2d at 306-07; see Brief of Appellant Burlington Northern Inc. at 75-82.

31. 308 Minn. at 228, 243 N.W.2d at 307.

32. *Id.* at 227, 243 N.W.2d at 306.

33. *Id.* at 229-30, 243 N.W.2d at 307.

34. *Id.* at 231-32, 243 N.W.2d at 308.

35. See *id.*

36. See *Great Northern II*, 263 N.W.2d at 615; Appellants' Appendix Burlington Northern Inc. at A-22 to -30 (memorandum of instructions to the trustees by the district court dated February 17, 1977).

37. See note 36 *supra*.

38. See *id.*

39. 263 N.W.2d 610 (Minn.), cert. denied, 439 U.S. 835 (1978).

40. Appellants' Appendix at A-13, *Great Northern I*, 308 Minn. 221, 243 N.W.2d 302, cert. denied, 429 U.S. 1001 (1976) (quoting paragraph 17 of the trust instrument; trustees to "wind up" trust affairs upon the death of the last of 18 named lives plus 20 years). See

clause should be construed to require liquidation of all trust assets and distribution of the proceeds solely to the certificate holders during the final year of the trust.⁴¹ The court held, however, that the respondents' argument was without merit because the trust instrument contained a definition of the term "wind up."⁴² Therefore, the term could not be given a meaning other than that contained in the trust instrument.⁴³

Second, the respondents argued that the settlor did not intend the reversioner to receive anything of value at the end of the trust term.⁴⁴ They asserted that letters and statements made by James J. Hill at the inception of the trust established that the settlor expected the trust's marketable ore supply to be exhausted before the end of the trust term.⁴⁵ The supreme court, repeating its earlier determination that the trust instrument was unambiguous on its face,⁴⁶ rejected this assertion, holding that the settlor's intent was clear from the four corners of the trust instrument.⁴⁷ The court found that the trust clearly created a reversionary interest in all real property remaining at the termination of the trust.⁴⁸

Third, the respondents argued that a "practical construction" of the trust instrument, in light of past sales of the trust corpus by the trustees, would give rise to a duty to sell all properties and distribute the proceeds to the certificate holders as the trust neared termination.⁴⁹ The court decided that merely because some proceeds from land sales had been distributed to the certificate holders in the past did not mean the reversioner would be estopped from contesting liquidation of the corpus in

generally MINN. REV. LAWS ch. 60, § 3249(6) (1905) (current version at MINN. STAT. § 501.11(6) (1978)) (a trust shall not continue for a period longer than the life or lives of specified persons in being at the time of its creation plus 21 years).

41. 263 N.W.2d at 616; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 26-31.

42. 263 N.W.2d at 617 (quoting paragraph 17 of the trust instrument).

43. *Id.* The court stated that "[h]ad the settlor intended to require conversion of all trust assets to cash, it could have so provided." *Id.*

44. *Id.*; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 9-19.

45. 263 N.W.2d at 617. For a complete record of the extrinsic evidence offered by the respondents, see Supplemental Record, Great Northern I, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976).

46. 263 N.W.2d at 617-18 ("trial court's reliance upon . . . extrinsic evidence . . . is clearly inconsistent with this court's prior opinion [in Great Northern I]").

47. *See id.* Because trusts are subject to the rules governing parol evidence, the court's finding that the trust was unambiguous precluded the admission of extrinsic evidence offered by the respondents. *See, e.g., In re Declaration of Trust Made by Bush*, 249 Minn. 36, 42-43, 81 N.W.2d 615, 620 (1957) (applying parol evidence rule in determination whether extrinsic evidence should be admitted); *Jordan v. Jordan*, 193 Minn. 428, 431-32, 259 N.W. 386, 388 (1935) (trust agreements are subject to law governing other writings).

48. 263 N.W.2d at 617-18.

49. *See id.* at 618; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 31-55.

the future.⁵⁰ In addition, the court found that the liquidation of trust assets was clearly within the trustees' discretionary powers but was not a mandatory duty.⁵¹ The instruction to convert trust assets was held to be erroneous as well as inconsistent with the court's opinion in *Great Northern I*.⁵²

Having determined that no duty to convert trust assets to cash could be found in the trust instrument, the court next considered whether a fiduciary duty to liquidate the corpus could be imposed upon the trustees by operation of law. The respondents maintained that the trust was a "business trust" and, therefore, the duties owed by the trustees to the reversioner were not governed by the ordinary principles of the law of trusts.⁵³ The court distinguished the *Great Northern* trust from an ordinary business trust by observing that the trust, unlike a business trust, was not created by a contract combining capital contributions, but rather by a gift from the settlor.⁵⁴ Furthermore, the certificate holders had not contributed to any of the trust principal.⁵⁵ All of the trust

50. 263 N.W.2d at 618.

51. *Id.* The trust instrument expressly grants a discretionary power to the trustees to sell or exchange any or all of the trust property. See Appellants, Appendix at A-10, *Great Northern I*, 308 Minn. 221, 243 N.W.2d 302, cert. denied, 429 U.S. 1001 (1976) (paragraph 9 of the trust instrument). Similarly, the trustees may distribute and pay to the beneficiaries that portion of the net income or proceeds from the sale of the property as the trustees deem proper. See *id.* at A-8 (paragraph 4 of the trust instrument).

Prior decisions by the supreme court support the holding in *Great Northern II*. Under Minnesota law, a trustee is bound only to common law fiduciary principles when exercising discretionary powers under a trust. See, e.g., *In re Trust Under Will of Comstock*, 219 Minn. 325, 332-35, 17 N.W.2d 656, 661-62 (1945) (discretionary power of sale; trustee must employ diligence and prudence when exercising discretion); *In re Trusts Under Will of McCann*, 212 Minn. 233, 240-41, 3 N.W.2d 226, 230-31 (1942) (discretionary power of sale; trustee must use sound judgment in exercising broad discretionary powers); *In re Trust Created by Watland*, 211 Minn. 84, 92, 300 N.W. 195, 199 (1941) (discretionary payment of trust income to beneficiaries; trustees "bound to exercise a soundness of judgment which follows from a due appreciation of trust responsibility"). It is apparent, therefore, that while past conduct by a trustee does not create an estoppel, see 263 N.W.2d at 618, a dissatisfied beneficiary may recover damages suffered if the deviation from prior conduct by the trustee constitutes a fiduciary violation. Cf. *In re Trust Created by Watland*, 211 Minn. 84, 93, 300 N.W. 195, 200 (1941) (trustees found liable for misapplication of stock proceeds as income).

52. See 263 N.W.2d at 618.

53. *Id.* at 619; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 64-68.

54. 263 N.W.2d at 619.

55. See *id.* A business trust is commonly organized as a device for profit-making whereby investors, the ultimate beneficiaries of the trust, contribute capital. See, e.g., *Berry v. McCourt*, 1 Ohio App. 2d 172, 177-78, 204 N.E.2d 235, 240 (1965) (business trust not created when entity arose from a gift rather than capital contributed by the beneficiaries); G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 247, at 147-50 (rev. 2d ed. 1977). The business trust entity originally developed in Massachusetts because the general incorporation statutes did not permit corporations to be organized for the purpose of developing and dealing in real estate. See Comment, 37 YALE L.J. 1103, 1106 (1928). See generally MINN. STAT. §§ 318.01-.06 (1978) (business trusts presently governed by statute).

property had been originally purchased by James J. Hill with his own funds, conveyed to Lake Superior Company, Ltd., and ultimately transferred to the trust.⁵⁶ While the court determined that the trust bore "more of the characteristics of an ordinary trust,"⁵⁷ the court found it unnecessary to make a final decision regarding the nature of the trust, ruling that the trustees of any form of trust are subject to "the underlying equitable and fiduciary duties toward trust beneficiaries imposed by the common law of trusts."⁵⁸

The respondents next argued that, because the corpus is a wasting asset, the trustees would violate no fiduciary duty by mining the property to exhaustion during the trust term.⁵⁹ Consequently, the respondents contended, the trustees were bound to exhaust the corpus before expiration of the trust term, or, if this could not be accomplished, to sell all trust property and distribute the proceeds to the certificate holders.⁶⁰ The supreme court disagreed, distinguishing between the orderly, consistent mining of an asset to gradual consumption and the deliberate attempt to liquidate the entire asset for the sole benefit of the income beneficiaries and to the exclusion of the reversionary beneficiaries.⁶¹ While the life beneficiaries may be entitled to the entire trust income even if the corpus is exhausted, the court held that a reversionary interest may not be destroyed if time does not allow depletion of the wasting asset during the trust term.⁶² The court concluded: "Such complete and deliberate liquidation of the entire reversion for the benefit of income beneficiaries cannot be allowed with impunity."⁶³

The respondents also repeated an argument from *Great Northern I*, asserting that the trustees owed no duty to the reversioner because the

56. See note 6 *supra*.

57. 263 N.W.2d at 619.

58. *Id.* at 620. Usually, trustees of a business trust have been held subject to the fiduciary duties imposed upon all trustees under traditional trust principles. See, e.g., *Goldwater v. Oltman*, 210 Cal. 408, 420-22, 292 P. 624, 629 (1930) (new use of trust form does not mean new principles should apply); *Schumann-Heink v. Folsom*, 328 Ill. 321, 326-27, 159 N.E. 250, 252 (1927) (well-established principles of contracts and trusts applied to business trust); *Hauser v. Catlett*, 197 Okla. 668, 674-75, 173 P.2d 728, 735 (1946) (business trusts, being trusts, subject to traditional trust principles); cf. *Wm. Lindeke Land Co. v. Kalman*, 190 Minn. 601, 610, 252 N.W. 650, 654 (1934) (contracts regarding business trusts subject to rules governing construction of ordinary contracts). But see *Berry v. McCourt*, 1 Ohio App. 2d 172, 177, 204 N.E.2d 235, 240 (1965) (states with a liberal interpretation of business trusts have deviated from application of traditional trust principles).

59. 263 N.W.2d at 620; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 19-26.

60. See note 59 *supra*.

61. See 263 N.W.2d at 620.

62. See *id.*

63. *Id.*

reversioner could not legally possess its reversionary interest.⁶⁴ Their position was based on the rule, followed in Minnesota, that when one or more of the purposes for establishing a trust becomes illegal, the trust will be terminated.⁶⁵ The respondents argued that a provision of the Great Northern charter, to which the reversioner had succeeded,⁶⁶ prohibited the railway from owning or acquiring mineral lands.⁶⁷ In addition, several Minnesota land statutes, in force when the trust was executed, forbade railroads from acquiring lands unnecessary to railroad operation.⁶⁸ More importantly, the respondents contended, federal law

64. See *id.* at 620-21; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 72-85.

65. See, e.g., *Rong v. Haller*, 109 Minn. 191, 198, 123 N.W. 471, 472 (1909) (violation of rule against perpetuities voided trust); *Appelgate v. Brown*, 168 Neb. 190, 200, 95 N.W.2d 341, 348 (1959) (any provision of a trust is valid unless it appears to be created for an illegal purpose); G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 211, at 402 (rev. 2d ed. 1979) (trusts that aid in evasion of civil or criminal statutes may be held void); *RESTATEMENT (SECOND) OF TRUSTS* §§ 61, 65, & 335, Comment d at 156 (1959) (when trust purpose initially or subsequently becomes illegal, trust will be terminated); cf. *Evans v. Abney*, 396 U.S. 435, 439 (1970) (charitable trust) (trust created for maintenance of segregated park terminated due to illegality of segregation); *Pennsylvania v. Brown*, 260 F. Supp. 323, 357 (E.D. Pa. 1966) (charitable trust) (because dispositions by trust must originally comply with applicable law as well as with later laws, trust establishing charitable school for poor white orphans cannot be enforced), *vacated on other grounds*, 373 F.2d 771 (3d Cir. 1967).

If, however, the illegal provision of the trust is separable from other valid clauses, only the illegal portion will fail. See, e.g., *Burns v. Grable*, 138 Cal. App. 2d 280, 287-89, 291 P.2d 969, 974 (valid portions of trust disturbed only when removing illegal provision will upset entire trust purpose), *cert. denied*, 352 U.S. 842 (1956); *In re Gump's Estate*, 16 Cal. 2d 535, 547-48, 107 P.2d 17, 23-24 (1940) (provision in violation of rule against perpetuities severed from otherwise valid portions of trust); *Wilmington Trust Co. v. Wilmington Trust Co.*, 25 Del. Ch. 121, 150-53, 15 A.2d 153, 167 (1940) (valid trust provisions independent and separable from provision that violated rule against perpetuities), *aff'd*, 26 Del. Ch. 397, 24 A.2d 309 (1942); *Bemis v. Northwestern Trust Co.*, 117 Minn. 409, 414, 135 N.W. 1124, 1125 (1912) (when there are distinct and individual provisions in a trust, some valid and some invalid, effect is given those that are valid); *RESTATEMENT (SECOND) OF TRUSTS* § 65 (1959) (if an illegal trust provision can be separated from other provisions without defeating the trust's purpose, valid portions will stand).

66. See note 11 *supra*.

67. 263 N.W.2d at 620-21; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 77-84.

68. 263 N.W.2d at 620-21; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 80-83; see MINN. REV. LAWS ch. 59, §§ 3237, 3239 (1905) (repealed 1945) (prohibiting railroads from holding or acquiring lands other than as may be necessary for their operation, upon penalty of forfeiture of such lands).

Because the trust corpus consisted of stock holdings in several corporations until 1956, see Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 81-82, *Great Northern I*, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976), and should therefore have been considered personalty under Minnesota law, see *Congdon v. Congdon*, 160 Minn. 343, 371-76, 200 N.W. 76, 86-88 (1924), the claim of the respondents is arguably erroneous. The land statutes will not prevent Burlington Northern from taking title to the

prevented the reversioner from legally holding the reversion.⁶⁹ Their argument was based on the commodities clause of the Hepburn Act,⁷⁰ which prohibits a company from transporting ore from any land in which it has any direct or indirect interest.⁷¹

The *Great Northern II* court rejected the illegality argument because Great Northern Railway had not acquired its interest in the trust until seven years after the trust had been created.⁷² Thus, the court, extending its conclusion from *Great Northern I* to the three illegality claims, held that the reversion could not be defeated when it was valid at the inception of the trust solely because the reversioner may be prohibited from retaining the reversion upon termination of the trust.⁷³ Moreover, the court stated, the proper time to contest the reversion would be at the end of the trust term.⁷⁴ The opinion of the *Great Northern II* court apparently recognized a distinction between the trust doctrine of illegal purpose and situations where the law would prevent the reversioner from holding title in the corpus. Typical instances in which the illegal purpose doctrine has been invoked include trusts to induce a criminal

corpus upon termination of the trust due to their repeal in 1945. See Act of Apr. 13, 1945, ch. 280, § 1(3), 1945 Minn. Laws 468, 469 (repealing MINN. REV. LAWS ch. 59, §§ 3237, 3239 (1905)).

69. 263 N.W.2d at 620-21; Brief of Respondents Charles S. Arms and Elizabeth P. Arms at 74-77. The respondents supported their argument by quoting dicta from the 1950 decision of *Reynolds v. Hill*, 184 F.2d 294, 297-98 (8th Cir. 1950), *aff'g* 75 F. Supp. 408 (D. Minn. 1948), where the court stated that the Great Northern trust was established to avoid violating the Hepburn Act.

70. Hepburn Act, § 1, para. 5, 34 Stat. 584, 585 (1906) (current version at 49 U.S.C. § 1(8) (1976)).

71. The commodities clause of the Hepburn Act states as follows:

It shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

Hepburn Act § 1, para. 5, 49 U.S.C. § 1(8) (1976).

72. See 263 N.W.2d at 621; note 11 *supra*.

73. 263 N.W.2d at 621 (quoting *Great Northern I*, 308 Minn. 221, 243 N.W.2d 302, *cert. denied*, 429 U.S. 1001 (1976)).

74. *Id.* at 621. Raising an apparent ripeness issue, the court indicated that the correct remedy for any commodities clause violation due to Burlington Northern's anticipated acquisition of the trust corpus would be an enforcement action under the Hepburn Act after the reversion occurs. *Id.*; see Interstate Commerce Act § 12, 49 U.S.C. § 12(1)(a) (1976) (Interstate Commerce Commission "is authorized and required to execute and enforce the provisions of this chapter"). In addition, the court stated that the proper remedy for the alleged charter violation by Burlington Northern would be an *ultra vires* action under MINN. STAT. § 301.12 (1978) at the time of the reversion. See 263 N.W.2d at 621.

act⁷⁵ or trusts in violation of the rules against passive trusts,⁷⁶ accumulations,⁷⁷ and perpetuities.⁷⁸ Within this analysis, the illegal purpose situation may be contrasted with the Great Northern trust, which involved the legal trust purpose of providing for the orderly mining of certain mineral-bearing properties and payment of the income to a specific class of beneficiaries with reversion over.⁷⁹

In either event, the legal consequence of finding an illegal trust purpose or declaring that the reversioner could not legally hold title to the reversion would be the same. First, when a trust fails because of an illegal purpose, it has generally been held that a resulting trust in the trustees for the benefit of the settlor or the settlor's successors is created.⁸⁰ In the instance of the Great Northern trust, the reversioner, Burlington Northern, is the settlor's successor in interest.⁸¹ Second, if a legal prohibition would prevent a reversioner from retaining possession of the corpus upon conclusion of a trust, the reversioner would simply be required to dispose of the interest.⁸² Accordingly, if upon termination

75. See, e.g., *Bauer v. Bates Lumber Co.*, 84 N.M. 391, 392-93, 503 P.2d 1169, 1170-71 (1972) (trust created to circumvent statute illegal and unenforceable); cf. *Evans v. Abney*, 396 U.S. 435, 439 (1970) (charitable trust) (trust created for purpose of supporting segregated park must fail due to illegality of segregation); *Pennsylvania v. Brown*, 260 F. Supp. 323, 357 (E.D. Pa. 1966) (charitable trust) (trust establishing charitable school for white orphans cannot be enforced under applicable law), *vacated on other grounds*, 373 F.2d 771 (3d Cir. 1967).

76. See, e.g., *Larkin v. McCabe*, 211 Minn. 11, 23-24, 299 N.W. 649, 655 (1941) (passive trust abolished by statute must fail as an illegal trust); *Thompson v. Conant*, 52 Minn. 208, 210-11, 53 N.W. 1145, 1145-46 (1893) (same).

77. See, e.g., *Minnesota Loan & Trust Co. v. Douglas*, 135 Minn. 413, 423-26, 161 N.W. 158, 162-64 (1917) (trust providing for accumulations beyond statutorily allowed period declared void); *Mann-Vynne v. Equitable Trust Co.*, 201 A.D. 149, 151-52, 194 N.Y.S. 50-52 (1922) (clause providing for accumulation of income cannot be severed without altering settlor's purpose; trust declared void).

78. See, e.g., *Rong v. Haller*, 109 Minn. 191, 198, 123 N.W. 471, 472 (1909) (violation of statutory rule against perpetuities voided trust).

79. *Great Northern II*, 263 N.W.2d at 614.

80. See, e.g., *Union Trust Co. v. McCaughn*, 24 F.2d 459, 462 (3d Cir. 1927) (where trust failed, resulting trust arose in favor of donor); *Applegate v. Brown*, 168 Neb. 190, 202, 95 N.W.2d 341, 348 (1959) (when trust purpose becomes illegal, there will be a resulting trust in favor of settlor); *Tilden v. Green*, 130 N.Y. 29, 52, 28 N.E. 880, 884 (1891) (when trust void for illegality, property vests in heirs); *Continental Oil Co. v. Berry*, 187 Okla. 390, 392-93, 103 P.2d 69, 71 (1940) (if trust rendered void, property vests in donor or donor's heirs); *RESTATEMENT (SECOND) OF TRUSTS* § 345, Comment i at 197 (1959); *A. SCOTT, THE LAW OF TRUSTS* § 345.3, at 2743 (3d ed. 1967); cf. *Evans v. Abney*, 396 U.S. 435, 539 (1970) (charitable trust) (when trust purpose becomes illegal, corpus reverts to settlor's heirs by operation of law).

81. See note 11 *supra* and accompanying text.

82. Cf. *United States v. Reading Co.*, 253 U.S. 26, 63-64 (1920) (combination of companies in violation of Sherman Anti-Trust Act and Hepburn Act must dissolve and provision for sale of stock must be made). See generally *United States v. Delaware & Hudson Co.*, 213 U.S. 366 (1909). In *Delaware & Hudson Co.*, the Court held that a railroad could be

of the Great Northern trust a court should decide that the reversioner cannot hold title to the corpus, then the railroad should be required to sell the property, retaining the proceeds for its own benefit.⁸³ Therefore, in both situations, the certificate holders would not be entitled to the value of the reversion.

The Minnesota court concluded its opinion in *Great Northern II* by giving the requested instructions to the trustees.⁸⁴ Formally adopting sections 183 and 232 of the *Restatement (Second) of Trusts*,⁸⁵ the court advised the trustees that the law of trusts requires the trustees of trusts involving successive beneficiaries to treat all beneficiaries impartially and "to act with due regard to their respective interests."⁸⁶ The court's

prohibited from transporting commodities by the Hepburn Act only in three circumstances: first, when the commodity was manufactured, mined, or produced by a carrier and at the time of transport the carrier had not divested itself of the commodity in good faith; second, when the carrier owns the transported commodity in whole or in part; and third, when the carrier had a direct or indirect interest in the transported commodity in a legal or equitable sense. *See id.* at 415.

83. Under present Minnesota and federal law, it is unlikely that a court will order Burlington Northern to divest itself of the Great Northern reversion upon termination of the trust. The claim that transfer of the reversion to Burlington Northern would be ultra vires appears untenable under Minnesota law: "Every corporation shall confine its acts to those authorized by the statement of purposes in the articles of incorporation and within the limitations and restrictions, if any, contained therein, *but shall have the capacity possessed by natural persons to perform all acts within or without this state.*" MINN. STAT. § 301.12 (1978) (emphasis added). Because the Great Northern charter contains no specific limitation upon the railroad's capacity to acquire property, possession of the Great Northern trust reversion is within the corporate capacity of Burlington Northern. *See also* *Derfoot v. Farmers' & Merchants' Bank*, 218 U.S. 281, 286 (1910) (in absence of statute to the contrary, conveyance of real estate to corporation for purpose not in charter cannot be impugned upon lack of capacity grounds).

The respondents also asserted that the Hepburn Act would prevent Burlington Northern from holding the Great Northern reversion. *See* notes 69-71 *supra* and accompanying text. Although the respondents' position may be apparent from a simple reading of the Hepburn Act, the argument fails to consider decisions of the United States Supreme Court in which the rights to mineral commodities are involved. The Court has ruled that the Hepburn Act is not violated when the railroad leases its interest in the commodity because, under a mineral lease, the railroad's interest ceases when ore is severed from the ground. *See, e.g., United States v. Delaware, L. & W.R.R.*, 238 U.S. 516, 536 (1915) (if railroad sells coal at the mouth of mine, Hepburn Act not violated); *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 413 (1909) (no violation if carrier disassociates itself from commodity before transportation). Thus, when the mining rights are leased, the railroad has no legal interest in the ore it transports. Under this analysis, Burlington Northern's interest would not be invalidated by the Hepburn Act.

84. *See* 263 N.W.2d at 621-22.

85. *See id.* at 621.

86. *Id.* (quoting RESTATEMENT (SECOND) OF TRUSTS § 232 (1959)). When the trust instrument is silent, modern trustees are subject to a statutory duty of impartiality codified in the Minnesota Revised Uniform Principal and Income Act. *See* MINN. STAT. §§ 501.48-.63 (1978). Subdivision 1 of section 501.49 states that "[a] trust shall be administered

instruction could raise additional problems for the Great Northern trustees. The trustees must now undertake only those transactions that prejudice neither the income nor the reversionary beneficiaries. Almost any sale of Great Northern assets, however, probably would be prejudicial to the reversioner and could result in a suit to enforce the trustees' duty of impartiality. While reaffirming the common law trust principle that a fiduciary must be impartial in dealing with the conflicting interests of successive beneficiaries to a trust,⁸⁷ the court's decision may have rendered ineffective trust provisions authorizing discretionary conversion when the corpus consists of wasting assets. Consequently, further decisions by the court may be necessary to determine when the exercise of the trustees' discretion to liquidate trust properties of a wasting character violates their duty of impartiality to the reversioner.⁸⁸

with due regard to the respective interests of income beneficiaries and remaindermen." *Id.* § 501.49.

87. The trustees' duty to act without partiality towards both life tenants and remaindermen has been expressed in only one other Minnesota case. *See Congdon v. Congdon*, 160 Minn. 343, 376, 200 N.W. 76, 88 (1924).

88. The parties are currently before the district court to determine whether the approximately \$3,000,000 in attorney's fees that have accrued since 1972 should be paid by the trust. If this question is decided in the affirmative, the district court must then decide whether the fees are payable out of principal or income. *See* Petitions and Motions for Allowance of Attorney's Fees, *In re* Trust Known as Great Northern Iron Ore Properties, No. 386008 (Minn. 2d Dist. Ct.). The principal or income question is of extreme importance to the certificate holders because payment out of income has a potential impact upon the value of their certificates. *See generally* Great Northern Iron Ore Properties, Seventy-Second Annual Report of the Trustees to Certificate Holders 1 (1978) (average annual trust net income over past five years is approximately \$2,500,000).